Petition

81-250

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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

KENNIE R. CHILDERS AND BLACK DIAMOND COAL COMPANY, INC. .. Petitioners,

V.

UNITED STATES OF AMERICA; DEPARTMENT OF TREASURY; INTERNAL REVENUE SERVICE; JEROME KURTZ, COMMISSIONER OF INTERNAL REVENUE; JAMES P. BOYLE, DISTRICT DIRECTOR, INTERNAL REVENUE; CARL W. SCHELL, GROUP MANAGER; and, CLYDE H. ALLISON, REVENUE OFFICER, .. Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. WHETHER SUBJECT MATTER JURISDICTION EXISTS IN THE UNITED STATES DISTRICT COURTS:

A. IN AN ACTION BY A TAXPAYER TO CONTEST THE CONSTITUTIONALITY OF INTERNAL REVENUE SERVICE COLLECTION PROCEDURES;

B. IN AN ACTION BY A TAXPAYER TO QUIET TITLE TO PROPERTY TO WHICH A TAX LIEN HAS ATTACHED AND UPON WHICH THE INTERNAL REVENUE SERVICE HAS LEVIED, BUT IN WHICH THE TAXPAYER DOES NOT CONTEST TAX LIABILITY;

C. IN AN ACTION BY A TAXPAYER FOR A JUDICIAL DECLARATION OF THE RESPECTIVE RIGHTS OF THE TAXPAYER AND THE INTERNAL REVENUE SERVICE PURSUANT TO AN AGREEMENT RELATING TO THE COLLECTION OF AN UNDISPUTED TAX LIABILITY;

D. IN AN ACTION BY A TAXPAYER CHALLENGING THE VALIDITY OF A LEVY BY THE INTERNAL REVENUE SERVICE ON HIS PERSONAL RESIDENCE AT A TIME WHEN THE INTERNAL REVENUE SERVICE HELD, BY VOLUNTARY ASSIGNMENT, AN ASSET HAVING A FACIAL VALUE APPROXIMATING TWICE THE AMOUNT OF THE ASSESSED TAX LIABILITY.

II. WHETHER THE INTERNAL REVENUE SERVICE MAY PROCEED TO COLLECT A TAXPAYER'S ENTIRE TAX LIABILITY FROM HIS REMAINING ASSETS AFTER HAVING ACCEPTED AND WHILE CONTINUING TO HOLD AN ASSIGNMENT OF A VALUABLE ASSET WHICH WAS CAPABLE OF SATISFYING HIS OBLIGATION WITHOUT;

A. VIOLATING THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION;

B. VIOLATING THE TERMS OF A VALIDLY EXECUTED ASSIGNMENT, ESCROW AGREEMENT AND FORM 433-D INSTALLMENT AGREEMENT;

C. BEING ESTOPPED TO ACT CONTRARY TO VALIDLY EXECUTED FORM 433-D INSTALLMENT AGREEMENT, ESCROW AGREEMENT, CORPORATE RESOLUTION, AND ASSIGNMENT.

III. WHETHER A TAXPAYER IS ENTITLED TO A JUDGMENT QUIETING TITLE WHEN HIS RESIDENCE HAS BEEN SUBJECTED TO AN IMPROPER LEVY BY THE INTERNAL REVENUE SERVICE.

IV. WHETHER THE APPLICATION OF 26 U.S.C. §7421, 28 U.S.C. §2201 AND THE *ENOCHS* EXCEPTION IN A MANNER THAT DIVESTS A TAXPAYER OF EQUITABLE REMEDIES NECESSARY TO SAFEGUARD HIS CONSTITUTIONAL RIGHTS IS UNCONSTITUTIONAL.

V. WHETHER A TAXPAYER IS ENTITLED TO EQUITABLE RELIEF TO PREVENT UNCONSTITUTIONAL ACTION BY THE INTERNAL REVENUE SERVICE.

VI. WHETHER DENIAL OF A TAXPAYER REQUEST FOR PRODUCTION OF DOCUMENTS IN AN ACTION IN WHICH SUBJECT MATTER JURISDICTION MAY DEPEND UPON HIS ABILITY TO SHOW THAT THE UNITED STATES CANNOT ULTIMATELY PREVAIL DEPRIVES HIM OF HIS RIGHT OF DUE PROCESS UNDER THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

PARTIES

(*See* caption. Black Diamond Coal Company, Inc. has no parents, subsidiaries, or affiliates.)

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is unreported and is printed in the Appendix hereto, *infra*, page 1a. The memorandum opinion of the United States District Court for the Western District of Virginia is reported at 46 A.F.T.R. 2d 80-5681 and is printed in the Appendix hereto, *infra*, page 17a.

JURISDICTION

The petitioners invoke the jurisdiction of the United States Supreme Court in this petition from the *per curiam* opinion of the United States Court of Appeals for the Fourth Circuit rendered May 8, 1981, pursuant to 28 U.S.C. §2101(c).

CONSTITITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

U.S. CONST. art. III, §2; U.S. CONST. amend. V; 26 U.S.C. §7421; 28 U.S.C. §2201; and 28 U.S.C. §2410. These are printed in the Appendix hereto, *infra*, pages 36a-44a.

STATEMENT OF THE CASE

The petitioner, Kennie R. Childers, is an independent coal operator and is the president and sole shareholder of the petitioner, Black Diamond Coal Company, Inc., a West Virginia corporation. Due largely to the failure of his corporate entity to

properly avail itself of tax incentives and benefits available to domestic energy producers, Childers became personally indebted to the Internal Revenue Service for 1975 and 1976 individual income taxes totaling approximately $1,000,000. Upon being notified of his tax liability, the amount and legality of which he has never contested, Childers entered into negotiations with IRS officials to establish a method for the payment of his tax liability. As a result of those negotiations, Childers executed documents on June 14, 1978, which assigned to the IRS a royalty interest in a certain coal lease. The lease was for a period of ten years and provided for a royalty in the amount of four percent (4%) of the gross proceeds from coal produced and sold from the leasehold, with a minimum annual royalty in the amount of $250,000. He simultaneously executed a Form 433-D Installment Agreement for the payment of his taxes. (The relevant documents are printed in their entirety in the Appendix hereto.)

Although payments totaling approximately $100,000 were made to the IRS, upon the failure of the royalty obligors to make the first required minimum annual royalty payment, the IRS levied upon Childers' residence. Childers then commenced this litigation by filing a complaint in the United States District Court for the Western District of Virginia seeking a judgment declaring the obligations of the parties pursuant to the foregoing

arrangement, quieting title to his residence and enjoining any tax sale of his residence. Attempts by Childers to litigate the rights of all the parties to the underlying agreements, by motion to join the royalty obligors as parties defendant and by a subsequent action naming both the royalty obligors and the appropriate officers of the IRS as defendants, were resisted by the IRS and denied by the District Court.

At no point did the IRS renounce its assignment of Childers' royalty interest, or reassign that interest back to Childers. Thus, when the IRS appeared before the district court, it was holding an asset which it had taken by voluntary assignment having a facial value of approximately twice the amount of Childers' tax liability plus an asset which it had taken by a levy having a value approximately equal to the tax liability. In spite of these circumstances, the IRS made no pleading of any reason whatsoever to believe that the asset which it had taken from Childers by voluntary assignment was of insufficient value to satisfy his tax liability. The district court denied Childers' efforts to obtain discovery and granted summary judgment against Childers without even considering whether or not the levy upon Childers residence was accompanied by any reason for the IRS to believe that the asset which it had taken by assignment was insufficient to satisfy his tax liability. On appeal, the United

States Court of Appeals for the Fourth Circuit, proportedly applying the Anti-Injunction Act, 26 U.S.C. § 7421(a), in accordance with the teachings of this Court in *Enochs* v. *Williams Packing & Navigation Co.*, 370 U.S. 1 (1962), held that the district court lacked jurisdiction to grant any of the relief sought by Childers. In so holding, the court of appeals affirmed the decision of the district court, also without considering whether or not the IRS, at the time of its levy upon Childers' residence, had any reason to believe that the value of the asset which it held by assignment was insufficient to satisfy Childers' tax liability and without requiring the IRS to show any nexus whatsoever between the value of the assets taken and the amount of the tax liability.

The use of Installment Agreements such as that involved in the instant case is apparently a routine and integral part of the administration of the internal revenue laws. Indeed, in resisting Childers' efforts to obtain discovery concerning such agreements, the IRS represented that "tens of thousands" of such agreements were executed by its officials during the year 1978 alone.

JURISDICTION OF DISTRICT COURT

The basis for subject matter jurisdiction in *Kennie R. Childers* v. *United States of America, et al.*, No. 79-0191-A, filed in the United

States District Court for the Western District of Virginia, is 28 U.S.C. §§1331 and 28 U.S.C. §1340. The basis for subject matter jurisdiction in *Black Diamond Coal Co., Inc., et al.* v. *GSR, Inc., et al.*, No. 80-0196-A, filed in the United States District Court for the Western District of Virginia, is 28 U.S.C. §§1331, 1332, and 1340.

REASONS FOR GRANTING WRIT

THE QUESTIONS PRESENTED BY THE PETITION ARE OF SUBSTANTIAL IMPORTANCE IN THE ADMINISTRATION OF THE INTERNAL REVENUE LAWS.

It is without question that the collection of taxes is important to the ongoing affairs of the federal government. Included in this litigation are questions relating to the interpretation and enforcement of a Form 433-D Installment Agreement executed by Kennie R. Childers and agents of the Internal Revenue Service. These agreements are used to provide for the orderly collection of taxes and are entered into by the thousands, often executed by government agents ranking as low as GS-4. The district court found that there were over 2,000,000 signed originals or copies of Form 433-D Installment Agreements executed in 1978.

Despite the widespread use of the Installment Agreement as a collection device, there are no judicial decisions interpreting the document. This

situation presents great uncertainty to the taxpayer and the IRS alike. Neither party to an Installment Agreement can presently be sure of the rights and duties acquired thereunder nor can they know where and when those rights may be asserted. Even the constitutional parameters of thse legal arrangements remain uncharted. Give the immense impact which these agreements have upon the machinery of state and the lives of its citizens, it is incumbent upon this Court to fashion a workable, constitutional framework by which the rights of the taxpayers can be protected while still providing for the collection taxes.

The facts of this case highlight the dilemma faced by a taxpayer seeking a determination of his rights. Here, Childers assigned a right to receive royalties to the IRS pursuant to a simultaneously executed Installment Agreement. When the third parties obligated to pay the royalties failed to pay the first minimum annual royalty, the IRS unilaterally breached the agreement and levied upon Childers' residence. Childers was afforded no hearing and has been denied a judicial forum by the Fourth Circuit in his efforts to establish the rights of the parties to the Installment Agreement.

While this case is primarily one of first impression concerning a vast segment of the tax collection process, it presents this Court with the opportunity to forestall interruptions to the

collection of taxes by defining the rights of the parties.

THE DECISION BY THE COURT BELOW, THAT THE FEDERAL COURTS LACK SUBJECT MATTER JURISDICTION TO CONSIDER THE SUBSTANTIVE QUESTIONS PRESENTED BY THIS LITIGATION, IMPROPERLY INTERPRETS THE DECISION OF THIS COURT IN *ENOCHS V. WILLIAMS PACKING & NAVIGATION CO., INC.*, 370 U.S. 1 (1962) AND IS IN CONFLICT WITH THE DECISION OF THIS COURT IN *COMMISSIONER V. SHAPIRO*, 424 U.S. 614 (1976).

If the decision below is permitted to stand, the IRS will have successfully taken a taxpayer's residence through its statutory powers of levy and seizure while simultaneously holding, through voluntary assignment from the taxpayer, an asset having a facial value approximating twice the amount of the taxpayer's assessed tax liability, without ever being required to allege or to make even a threshold showing of probability or of any reason to believe that the asset held at the time of levy was insufficient to satisfy the assessed tax liability. The opinion of the court below would justify this result by broadly concluding that judicial inquiry into such matters is precluded by the Anti-Injunction Act, 26 U.S.C. § 7421(a), and is not within the exception to the Act, as established in *Enochs* v. *Williams's Packing & Navigation Co., Inc., supra*, that a plaintiff may seek injunctive relief with respect to the assessment or collection of

taxes only by meeting all of the traditional requirements for the exercise of equitable jurisdiction and by demonstrating that "under the most liberal view of the law and the facts," apparent at the time of the commencement of the action, "it is clear that under no circumstances could the government ultimately prevail." 370 U.S. at 7. The conclusions of the court below, if permitted to stand, essentially leave the IRS with unbridled power to take assets from a taxpayer, free from judicial intervention, and without ever making any showing that the total value of the assets taken bears any rational relationship to the total amount of tax liability. Moreover, the actions of the trial court and of the court below require the taxpayer to demonstrate freedom from the applicability of the Anti-Injunction Act on the basis of facts which can be pleaded at the time of the commencement of the suit. Both of these results were rejected in *Commissioner* v. *Shapiro, supra.* In *Shapiro,* this Court recognized that levies by the IRS may be subject to attack if the value of the properties taken greatly exceeds the amount of the tax due, and further recognized that the government's mere conclusary pleading that the taxpayer owed taxes in an amount greater than the value of the property taken was insufficient to raise the Anti-Injunction Act as a bar to the taxpayer's complaint. 464 U.S. at 632 n.14. Simultaneously, this Court recognized an obligation of the

government to provide some evidentiary basis for its position, either through affidavits or through discovery material. As indicated previously, the taxpayer in the instant case has presently endured a taking by the IRS of assets having a facial value greatly in excess of the amount of his tax liability, and has suffered the manifest irreparable injury resulting from the levy upon his residence. In *Shapiro*, this Court expressed doubts that "the need to collect the revenues is a sufficient reason to justify seizure causing irreparable injury without a prompt post seizure inquiry of any kind into the Commissioner's basis for his claim." *Id.* at 630 n. 12. In this case, the courts below have sanctioned a levy upon the petitioner's residence without so much as a bare allegation that such levy was reasonably necessary to the collection of the taxpayer's tax liability.

THE DECISION OF THE COURT BELOW, THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, IS IN CONFLICT WITH THE DECISIONS IN *AQUA BAR & LOUNGE, INC. V. UNITED STATES*, 539 F.2d 935 (3D CIR. 1976) and *UNITED STATES V. COSON*, 286 F.2d 453 (9TH CIR. 1961).

While holding that the district court lacked jurisdiction to quiet title to Childers' residence, the United States Court of Appeals for the Fourth Circuit recognized an apparent conflict between its ruling and the decision in *Aqua Bar & Lounge, Inc.*

v. *United States, supra.* The appellate court attempted to distinguish the cited case from the case at bar simply because the complaint of the taxpayer in the cited case was based upon an alleged failure of the IRS to follow the statutory requirements attendant to its seizure and sale of real property. The petitioner would respectfully submit that it should make no difference, in terms of the availability of subject matter jurisdiction, whether an IRS levy is claimed to be invalid because of a failure to follow prescribed statutory requirements or whether such a levy is claimed to be invalid because it greatly exceeds that necessary to satisfy the liability of the taxpayer. In *United States* v. *Coson, supra,* the United States Court of Appeals for the Ninth Circuit held that a complaint seeking the removal, as a cloud on the plaintiff's title, of an improperly asserted federal tax lien was not barred by the Anti-Injunction Act and that the federal courts have jurisdiction to entertain such actions. The decision of the court below is clearly in conflict with the decision in *Coson* just as it is in conflict with the decision in *Aqua.*

Obviously, the right to a judicial determination of the validity of an IRS tax levy should not be dependent upon the judicial circuit in which the property is located, and Kennie Childers should not be denied such a determination simply because his

home happens to be located in Virginia, rather than in California or Pennsylvania.

THE DECISION BY THE COURT BELOW LEAVES THE TAXPAYER WITHOUT A FORUM IN WHICH TO VINDICATE HIS RIGHT TO DUE PROCESS OF LAW IN THE TAX COLLECTION PROCESS OR IN WHICH TO ENFORCE CONTRACTUAL OBLIGATIONS ASSUMED BY THE INTERNAL REVENUE SERVICE AS A PART OF THE TAX COLLECTION PROCESS.

As previously indicated, the instant controversy has its genesis in an a negotiated agreement by which the parties undertook to contractually determine the manner in which Kennie Childers' undisputed tax liability would be satisfied. As a part of that agreement, the IRS took, and Childers gave up, an asset which has more than sufficient facial value to satisfy Childers' tax liability. The government has now taken and seeks to sell Childers' home while still retaining the originally assigned asset. The decisions of the courts below, if permitted to stand, will allow the government to accomplish the second taking without ever being required to allege or offer proof that the second taking was reasonably necessary to the collection of Childers' tax liability and without Childers ever being given any opportunity to demonstrate that, in taking his home, the government acted contrary to its obligations under the aforesaid agreement.

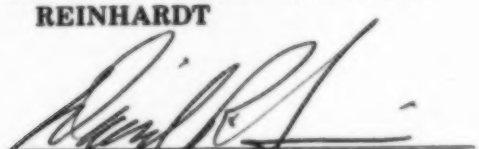
Admittedly, the requirements of constitutional due process are less within the context of the collection of revenues than in other area of government action. Indeed, as recognized in *Shapiro, supra,* even affidavits may be sufficient as long as they disclose basic facts from which the government may prevail. To date, Kennie Childers has been denied even such a modicum of due process and the decision of the court below would deny that the federal courts even have jurisdiction to provide such a modicum of due process. This Court has historically recognized that unreasonable, unnecessary or oppressive measures in the collection of taxes may infringe upon the constitutional guaranty of due process. *Helvering* v. *City Bank Farmers Trust Co.* 296 U.S. 85 (1935). Accordingly, the Anti-Injunction Act must be given an application which is at least as favorable to the taxpayer as the requirements of the constitution, and the decision of the court below is simply to close the doors of the only courts which could offer any meaningful remedy to taxpayers seeking to vindicate their constitutional right to due process of law in the tax collection process.

CONCLUSION

This petition presents questions which are crucial to the administration of the internal revenue laws, demonstrates that the Fourth Circuit improperly applied decisions of this Court, took a position in conflict with that taken by other circuit courts, and demonstrates a denial of fundamental due process rights. For these reasons, the petitioners respectfully request that this Court grant the petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

BULLEIT, KINKEAD, IRVIN & REINHARDT



David R. Irvin

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APPENDIX

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UNPUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 80-1623

KENNIE R. CHILDERS,

APPELLANT,

v.

UNITED STATES OF AMERICA; DEPARTMENT OF TREASURY; INTERNAL REVENUE SERVICE; JEROME KURTZ, COMMISSIONER OF INTERNAL REVENUE; JAMES P. BOYLE, DISTRICT DIRECTOR; CARL W. SCHELL, GROUP MANAGER; CLYDE H. ALLISON, REVENUE OFFICER,

APPELLEES.

No. 80-1775

BLACK DIAMOND COAL COMPANY, INC., AND KENNIE R. CHILDERS,

APPELLANTS,

v.

UNITED STATES OF AMERICA, DEPARTMENT OF
TREASURY; INTERNAL REVENUE SERVICE;
JEROME KURTZ, COMMISSIONER OF INTERNAL
REVENUE SERVICE; JAMES P. BOYLE, DISTRICT
DIRECTOR; CARL W. SCHELL, GROUP MANAGER;
CLYDE H. ALLISON, REVENUE OFFICER,

APPELLEES,

and

GSR, INC.; RENNERT INVESTMENT; K. DUANE McCLERRY; PHILLIP A. RENNERT; THASE WEBB, JR.; WILLIAM G. PETERSON;
ROBERT HORNE; JONATHAN B. HORNE; KEITH
A. KIRKAN;

DEFENDANTS

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA, AT ABINGDON. GLEN M. WILLIAMS, DISTRICT JUDGE.

ARGUED MARCH 3, 1981 DECIDED MAY 8, 1981

BEFORE HAYNSWORTH, CHIEF JUDGE, WINTER, CIRCUIT JUDGE, AND MICHAEL,* DISTRICT JUDGE.

CHARLES W. ARNOLD (ARNOLD, BULLEIT & KINKEAD ON BRIEF) FOR APPELLANTS; WILLIAM S. ESTABROOK, TAX DIVISION, DEPT. OF JUSTICE (JOHN F. MURRAY, ACTING ASSISTANT ATTORNEY GENERAL; JOHN S. EDWARDS, UNITED STATES ATTORNEY; MICHAEL L. PAUP, TAX DIVISION, DEPT. OF JUSTICE ON BRIEF) FOR APPELLEES.

PER CURIAM:

These consolidated appeals are from orders of the district court in Childers v. United States, et al. *(Childers)*, dissolving a preliminary injunction prohibiting a tax sale of Childers' residence and granting summary judgment for the federal defendants, and Black Diamond Coal Company, Inc., et al. v. GSR, Inc., et al. *(Black Diamond)*, dismissing the federal defendants from a suit for declaratory judgment. Childers and the Black Diamond Coal Company, Inc. (Black Diamond), a corporation of which he is the sole shareholder, both appeal. Because we find that the district court lacked

* Honorable James H. Michael, Jr., United States District Judge for the Western District of Virginia, sitting by designation.

jurisdiction to grant any of the relief sought by the plaintiffs with respect to the federal defendants, we affirm.

I.

Childers had unpaid liabilities for personal income taxes, penalties and interest for the years 1975 and 1976 in the amount of $959,367.59. In an effort to satisfy this debt and to forestall further collection efforts, Childers agreed in 1978 to assign mineral royalties from certain coal lands in West Virginia to the Internal Revenue Service (IRS) to pay his taxes on an installment basis. To carry out that agreement, the parties executed an "Assignment of Interest," which provided that Childers and Black Diamond would

> assign all of their right, title and interest in and to overriding royalties in the amount of four percent (4%) of the gross sales price of all coal mined and sold from the LEASED PREMISES and in the amount of the minimum annual royalty of two hundred and fifty thousand dollars ($250,000.00) payable with respect to that sublease between Black Diamond Coal Company and GSR, Inc.

Royalties were to be paid to IRS by GSR, Inc., one of Black Diamond's sublessees. Another document executed by the parties, the "Installment Agreement," provided that "[i]f the conditions of this agreement are not met (one being a payment to the IRS of a

minimum of $250,000 annually) . . . permission to make installment payments may be withdrawn and the entire tax liability may be collected by levy on income or by seizure of property."

After IRS failed to receive the $250,000 minimum payment due on December 31, 1978, it declared the Installment Agreement in default and, on August 31, 1979, executed a levy on Childers' real and personal property. On September 19, 1979, the complaint in the *Childers* case was filed, seeking various forms of declaratory and injunctive relief from the IRS' collection efforts. The district court issued first a temporary restraining order and later a preliminary injunction prohibiting the IRS from seizing and selling Childers' property. On June 19, 1980, Childers filed the complaint in the *Black Diamond* case, naming the United States as one of several defendants. In this suit Childers sought, among other remedies, a judgment "declaring the rights of the parties" to his agreement with IRS.

On July 8, 1980, the district court dissolved the preliminary injunction and granted the United States' motion for summary judgment in the *Childers* case. The district court did not rule on the government's contention that the district court lacked jurisdiction, but rather based its decision on a construction of the various documents embodying the agreement between Childers and IRS. The district court found that under those documents IRS was to receive $250,000

per year from Childers' coal leases, and that IRS was not required to pursue collection against GSR, Inc. or other third parties when payments were in default before it could act against Childers. On September 29, 1980, the district court granted the government's motion to dismiss on the grounds of sovereign immunity and a lack of jurisdiction in the *Black Diamond* case without opinion.

II.

Childers sought the following relief against the United States or one of its agencies or officers in the two suits: a declaratory judgment construing the agreement between Childers and IRS; an order voiding the government's levy upon Childers' property; a permanent injunction enjoining any attempt by the United States to seize and sell Childers' real property; an order releasing the government's lien against Childers' property; an order quieting title; and an order requiring the United States to satisfy its claim for taxes admittedly owed by Childers by collecting royalties from third persons which, Childers contends, are owing under the mineral lease agreements. It is manifest that Childers seeks to restrain the IRS from pursuing its statutory remedies to collect the taxes that Childers concedes are due. For the reasons which follow, we hold that Childers' actions were pro-

perly dismissed because the district court lacked jurisdiction to grant this relief.[1]

A. The Anti-Injunction Act.

Section 7421(a) of the Internal Revenue Code, 26 U.S.C. § 7421(a), the Anti-Injunction Act, provides that, with exceptions inapplicable here, "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed." The purpose of this statute is "to withdraw jurisdiction from the state and federal courts to entertain suits seeking injunctions prohibiting the collection of federal taxes," to protect the government's interest in the expeditious collection of taxes, and to facilitate the general process of federal tax collection by protecting the collector of taxes from the burdens of injunctive litigation. Enochs v. Williams Packing & Navigation Co. 370 U.S. 1, 5-8 (1962). In *Enochs*, the Supreme Court established the only exception to the Act. A plaintiff may seek injunctive relief with respect to the

[1] Although the district court ignored the jurisdictional issue in the *Childers* case, and found for the United States on the merits of Childers' claims, it is proper for this court to affirm on the ground that the district court lacked jurisdiction. It is the duty of a federal appellate court to determine, first, whether it has jurisdiction, and, second, whether the court whose judgment is is reviewing had jurisdiction. *See* Mansfield, Coldwater & Lake Michigan Ry. v. Swan, 111 U.S. 379, 381-87 (1884); P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, *Hart & Wechsler's The Federal Courts and the Federal System 835-39 (2d ed. 1973).*

assessment or collection of taxes only by (1) meeting all of the ordinary requirements for equitable jurisdiction and (2) demonstrating that "under the most liberal view of the law and the facts," apparent at the time of the suit, "it is clear that under no circumstances could the Government ultimately prevail." *Id.* at 7. *See* Bob Jones University v. Simon, 416 U.S. 725 (1974); Alexander v. "Americans United," 416 U.S. 752 (1974).

All of the relief Childers sought in the two suits, other than his request for a declaratory judgment, falls within the terms of the Act. The object of Childers' suits was to enjoin IRS from employing its collection remedies, to restrain the collection of his back taxes. Suits seeking these remedies are precisely the kind that the Act was intended to prohibit. Childers cannot escape the effect of the Act. He has failed to meet the requirements prescribed in *Enochs* for obtaining injunctive relief in tax cases. Whether or not Childers can establish the elements necessary for equity jurisdiction,[2] he cannot meet the second re-

[2] Without deciding the issue, we think it unlikely that Childers could show irreparable injury, a controlling factor for invoking equity jurisdiction. The Internal Revenue Code prescribes remedies to protect Childers' interest in seeing that the sale price of his residence is the best price obtainable. 26 U.S.C. §§ 6337(a) and (b). Any injury to his business reputation is attributable to his failure to pay the taxes which he concededly owes, not the collection efforts of IRS. If, as he contends, a levy upon and sale of his residence is in violation of his agreements with IRS, he may recover for breach of contract in an action in the Court of Claims. 28 U.S.C. § 1491.

quirement of *Enochs* — that it is clear that under no circumstances could the government ultimately prevail. He concedes that he has been unable to prove that the government cannot prevail in the actions that he has brought. While he ascribes this inability to limitations on his efforts to obtain discovery, we think that the district court afforded him the full discovery to which he was entitled within the parameters of relevance, and there was no abuse of discretion in denying him more.

Childers relies on Aqua Bar & Lounge, Inc. v. United States 539 F.2d 935 (3 Cir. 1976), in arguing that the district court had jurisdiction under 28 U.S.C. §§ 1340 and 2410. That case, however, is distinguishable. In *Aqua*, the Third Circuit held that 28 U.S.C. § 1340 (giving district courts jurisdiction of a "civil action arising under any Act of Congress providing for internal revenue") and 28 U.S.C. § 2410 (stating that the United States may be named in any civil suit "to quiet title to . . . real or personal property on which the United States has a claim or . . . lien") authorize a taxpayer to bring an action to quiet title to receive assurance that the sale of his property levied upon by IRS will be conducted according to the procedures prescribed in the Internal Revenue Code. 539 F.2d at 937-40. Here, Childers seeks relief that is quite different from that permitted in *Aqua*. He does not question IRS' compliance with the Code's procedures; he seeks rather to enforce the agreement, as he construes it, between him and IRS.

B. The Declaratory Judgment Act.

The declaratory judgment sought by Childers was barred by the Declaratory Judgment Act, 28 U.S.C. §§ 2201 & 2202. Section 2201 of the Act creates the remedy of declaratory judgment "except with respect to Federal taxes . . . " Because the declaratory judgment Childers sought relates to an agreement for the payment of his taxes, it is clearly "with respect to Federal taxes," and the Act, therefore, provides no remedy. *See* Professional Engineers, Inc. v. United States, 527 F.2d 597, 600 (4 Cir. 1975) ("[T]he federal tax exception to the Declaratory Judgment Act is at least as broad as the prohibition of the Anti-Injunction Act.").

AFFIRMED.

Clerk's Office U.S. Dist. Court
AT ABINGDON, VA.
FILED
JUL 8 1980
JOYCE F. WITT, Clerk
By: /s/ J. Sowder
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION

KENNIE R. CHILDERS
Plaintiff

CIVIL ACTION NO.
79-0191-A

MEMORANDUM OPINION

UNITED STATES OF AMERICA,
et al,

Defendants

This action concerns the construction of a periodic payment plan established for the purpose of collecting back taxes owed by plaintiff. The case is presently before this court on defendants' motion for summary judgment and to dissolve a preliminary injunction entered by this court.

I.

On June 14, 1978, plaintiff Kennie R. Childers was found liable to the Internal Revenue Service (I.R.S.) for personal income taxes in the amount of $1,151,759.18 for previous tax years. The amount and legality of this tax assessment are not issues in the case at bar.

In attempting to extinguish this obligation, plaintiff and the I.R.S. entered three agreements to establish a payment plan. The first document, a Form 433-D Installment Agreement, allowed plaintiff to satisfy his tax debt by making payments pursuant to a specified "Assignment of Interest." This latter document stated that plaintiff and his wholly owned company, Black Diamond Coal Co., Inc., shall

> assign all of their right, title and interest in and to overriding royalties in the amount of four percent (4%) of the gross sales price of all coal mined and sold from the LEASED PREMISES and in the amount of the minimum annual royalty of two hundred and fifty thousand dollars ($250,000.00) payable with respect to that Sublease between Black Diamond Coal Company and GSR, Inc.
>
> . . .
>
> INTERNAL REVENUE hereby accepts assignment of tonnage and minimum annual royalties to the extent of the liabilities stated [above].

The third agreement appointed an escrow agent to receive and disburse the royalties described in the Assignment of Interest. These latter two documents were prepared by plaintiff's attorneys and signed by plaintiff and an agent for the I.R.S.

It is clearly stated in the Installment Agreement that "[i]f the conditions of this agreement are not met [e.g., payment of the minimum $250,000.00 annually] . . . permission to make installment payments may be withdrawn, and the entire tax liability may be

collected by levy on income or by seizure of property." After the I.R.S. did not receive the minimum $250,000.00 annual payment on December 31, 1978,[1] they called the Installment Agreement in default and executed a levy on plaintiff's realty and personal property on August 31, 1979. This court, viewing the imminent irreparable harm to be suffered by plaintiff, granted a Temporary Restraining Order on September 19, 1979 preventing the I.R.S. from seizing and selling plaintiff's property. Later, on September 27, 1979, this court issued a preliminary injunction containing the same prohibition. This cause is presently before the court on defendant's motion for summary judgment and to dissolve the preliminary injunction.

II.

Plaintiff contends that the I.R.S. is required to pursue the collection of the minimum annual royalty against GSR, Inc. before any action may be taken against plaintiff. In other words, plaintiff is only liable for his tax debt if the I.R.S. cannot recover from GSR. Apparently, plaintiff perceives this primary obligation accruing to the I.R.S. pursuant to the following language contained in the Assignment of Interest: "WHEREAS, INTERNAL REVENUE is desirous of obtaining said assignment by BLACK DIAMOND on

[1] Also, the I.R.S. did not receive the minimum $250,000.00 annual payment on December 31, 1979. It appears that the total amount received from this payment agreement was only $22,219.02.

behalf of CHILDERS of the royalties tendered *in settlement* of the scheduled taxes." (emphasis added.)

It is black letter law that

> [w]here two papers are executed at the same time or contemporaneously between the same parties, in reference to the same subject-matter, they must be regarded as parts of one transaction and receive the same construction as if their several provisions were in one and the same instrument.

Oliver Refining Co. v. *Portsmouth Cotton Oil Refining Corp.*, 109 Va. 513, 64 S.E. 56, 59 (1090). However, this general rule is to be only utilized in determining the intent of the parties. So, if a contract restricts the applicabiity of another writing, the latter is only "construed as a part of the contract for the purpose and extent indicated."[2] *W. D. Nelson & Co.* v. *Taylor Heights Development Corp.*, 207 Va. 386, 150 S.E.2d 142, 146 (1966). *See also Guerini Stone Co.* v. *P. J. Carlin Construction Co.*, 240 U.S. 264 (1916); *General Contracting Corp.* v.*United States*, 70 F.2d 83 (4th Cir. 1934); *Texas Co.* v. *Northup*, 154, Va. 428m 153 S.E. 659 (1930).

---

[2] Conversely,

> in the absence of anything to indicate a contrary intention, instruments executed at the same time, by the same parties, for the same purpose, and in course of the same transaction, are, in the eye of the law, one instrument, and will be read and construed together as if they were as much one in form as they are in substance.

Texas Co. v. *Northup*, 154 Va. 428, 153 S.E. 659, 661-62 (1930).

In the case at bar, the Installment Agreement clearly binds plaintiff to pay the back taxes and does not consider the Assignment of Interest to be accepted in lieu of the tax liability. In fact, the Installment Agreement only refers to the Assignment of Interest with regard to payment information concerning the amount of the installments. As shown below, these clauses do not incorporate the Assignment of Interest as to negate plaintiff's liability.

> The undersigned [taxpayer] agrees that the Federal taxes shown above, plus any interest and penalties provided by law, will be paid as follows: Specific monthly amounts cannot be determined; see assignment for payment information.
>
> . . .
>
> Additional Conditions: See attached asignment for pertinent information as to payments and other stipulations as to consideration for 1978 and subsequent 1040 ES installments.

Even assuming the above rationale to be faulty, it is the opinion of this court that the Assignment of Interest clause relied upon by plaintiff is a self-serving, introductory recital without legal effect. While it is true that such recitals are often of aid in construing the intent of the parties, if "there is an inconsistency between the obligatory part of the contract and the recitals therein, effect will be given to the obligatory part rather than to the recitals, as this is regarded as the more vital and important of the two;

. . . ." *Scott* v. *Albemarle Horse Show Association*, 128 Va. 417, 104 S.E. 842, 845 (1920). The rule of *Scott* is especially applicable in the case at bar because plaintiff drafted the recital and its ambiguity, as created by the conflicting obligatory provision, is interpreted against the drafter. *See United States* v. *Morrison*, 370 F.Supp. 193 (E.D. Va. 1974); *Hutchinson* v. *King*, 206 Va. 619, 145 S.E. 2d 216 (1965).

In accordance with the rationale stated above, it is the opinion of this court that the agreements entered by the parties did not remove plaintiff's primary liability of the back taxes owed defendant. Therefore, the preliminary injunction previously entered by this court is dissolved and defendant's motion for summary judgment is granted.[3]

The Clerk of this court is directed to send certified copies of this Memorandum Opinion to counsel of record.

ENTER: This 8 day of July, 1980.

Glenn M. Williams
UNITED STATES DISTRICT JUDGE

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[3] Since this court has ruled in favor of defendants on the above issues, it finds no reason to consider the jurisdictional issues raised in the answer.

Clerk's Office U.S. Dist. Court
AT ABINGDON, VA.
FILED
JUL 8 1980
JOYCE F. WITT, Clerk
By: /s/ J. Sowder
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION

KENNIE R. CHILDERS
Plaintiff

CIVIL ACTION NO.
79-0191-A
ORDER

UNITED STATES OF AMERICA,
et al,

Defendants

In accordance with a Memorandum Opinion entered in this cause on this date, the preliminary injunction previously entered by this court is dissolved and defendants' motion for summary judgment is granted.

The case is hereby ORDERED stricken from the docket of this court.

The Clerk is directed to send certified copies of this Order to counsel of record.

ENTER: This 8 day of July, 1980.

Glen M. Williams
UNITED STATES DISTRICT JUDGE

****

Clerk's Office U.S. Dist. Court
AT ABINGDON, VA.
FILED
JUL 1 1980
JOYCE F. WITT, Clerk
By: /s/ J. Sowder
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION

KENNIE R. CHILDERS
Plaintiff

CIVIL ACTION NO.
79-0191-A

ORDER

UNITED STATES OF AMERICA,
et al,
Defendants

This Order concerns plaintiff's discovery requests for "all correspondence between the Office of Chief Counsel for the Internal Revenue Service General Litigation Division and the National Office Collection Division of the Internal Revenue Service relating to the Form 433-D" and [a]11 signed originals or copies of the Form 433-D executed in the year 1978." As to the first request, this court has inspected those documents *in camera* and finds them to be immaterial to the case at bar. Those documents shall be returned under separate cover to defendant. As to the second request, this court has the power to require the production of those documents, defendants' assertion to the contrary. However, the production of these estimated 2,000,000 forms would be bulky, burdensome, oppressive, and not material to the outcome of this case.

For the reasons stated above, both of plaintiff's requests are denied.

The Clerk of this court is directed to send a certified copy of this Order to counsel of record.

ENTER: This 1st day of July, 1980.

Glen M. Williams
U.S. DISTRICT JUDGE

Clerk's Office U.S. Dist. Court
AT ABINGDON, VA.
FILED
SEP 29, 1980
JOYCE F. WITT, Clerk
By: /s/ J. Todd
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
AT ABINGDON

BLACK DIAMOND
COAL COMPANY,
Plaintiffs

CIVIL ACTION NO.
80-0196-A

v.

GSR, INC., et al.,

Defendants

ORDER

Upon consideration of the Motion to Dismiss filed on behalf of the defendants United States of America, Department of the Treasury, Internal Revenue Service, Jerome Kurtz, James P. Boyle, Carl W. Schell and Clyde H. Allison, IT IS HEREBY

ORDERED that the said defendants are dismissed from this action.

This 29 day of September, 1980.

/s/ Glen M. Williams
GLEN M. WILLIAMS
United States District Court Judge

Form 433-D (Rev. August 1977)
Department of the Treasury
INSTALLMENT AGREEMENT

Names and Address of Taxpayer is Kennie & Debbie S. Childers,
Box 902, Bluefield, Virginia 24605
Social Security or Employer Identification Number (H) 235-44-1257 (W) 229-72-3443
Kinds of Taxes (Formm numbers) 1040
Tax Periods 7512 and 7612
Individual

The undersigned agrees that the Federal taxes shown above, plus any interest and penalties provided by law, will be paid as follows: Specific monthly amounts cannot be determined; see assignment for payment information.

Conditions of this Agreement:

- All Federal taxes that become due during the term of this agreement will be paid on time.

- Until this liability is satisfied, any refunds that might otherwise be due will be applied to this liability.
- If the conditions of this agreement are not met, or if it is determined that permission to make installment payments may be withdrawn, and the entire tax liability may be collected by levy on income or by seizure of property.

Additional Conditions:

See attached assignment for pertinent information as to payments and other stipulations as to consideration for 1978 and subsequent 1040ES installments.

/s/ Kennie R. Childers
Kennie R. Childers, 6/14/78

/s/ Carl W. Schell
Carl W. Schell, 6/15/78

For Assistance Contact:

Clyde H. Allison, Rev. Officer
P.O. Box 1331
Roanoke, Virginia 24007
Phone (703) 982-6476

Interviewer:

/s/ Clyde H. Allison
Clyde H. Allison, 54012216

Genoa Coal Co., Inc.
Blue Mountain Mining Co., Inc.
Box 902, Bluefield, Va. 24805
Flat Top National Bank
Bluefield, W. Virginia

Power of Attorney:

Thomas Bulleit
167 E. Main St.
Lexington, Ky. 40507
(606) 252-6765

ASSIGNMENT OF INTEREST

THIS ASSIGNMENT OF INTEREST, made and entered into this 14th day of June, 1978, by and between BLACK DIAMOND COAL COMPANY, a West Virginia corporation, (hereinafter referred to as "BLACK DIAMOND"), KENNIE R. CHILDERS of Bluefield, Virginia, (hereinafter referred to as "CHILDERS"), and THE UNITED STATES DEPARTMENT OF THE TREASURY — INTERNAL REVENUE SERVICE (hereinafter referred to as "INTERNAL REVENUE");

WITNESSETH:

WHEREAS, BLACK DIAMOND is the lessee of certain coal lands situated in McDowell County, West Virginia, acquired by Lease (attached hereto as Exhibit "A") dated July 1, 1974, by and between W. B. Swope as lessor and BLACK DIAMOND as lessee

(hereinafter "LEASED PREMISES") and further is a party to a Supplemental Agreement (attached hereto as Exhibit "B") dated November 7, 1977, by and between W. B. Swope and BLACK DIAMOND, wherein the above-mentioned Lease was modified to provide for the assignment of same; and,

WHEREAS, BLACK DIAMOND entered into a Sublease (attached hereto as Exhibit "C") of the LEASED PREMISES on December 31, 1977, by and between Black Diamond Coal Company and GSR, Inc.; and,

WHEREAS, BLACK DIAMOND has the contractual right to receive certain royalties pursuant to said Sublease in the amount of Two Hundred and Fifty Thousand Dollars ($250,000.00) as a minimum annual royalty, and Four Percent (4%) of the gross sales price of all coal mined and sold from the LEASED PREMISES as an overriding tonnage royalty; and,

WHEREAS, the Board of Directors of BLACK DIAMOND has adopted a Corporate Resolution proving the assignment of said minimum annual royalty and overriding royalty on behalf of Kennie R. Childers to INTERNAL REVENUE; and,

WHEREAS, Kennie R. Childers and Debra S. Childers have executed Waivers of Assessment as to certain taxable years which year and amount are scheduled in detail on Exhibit "D" hereto, said sums

bearing an interest rate and failure to pay penalty as provided by statute, from date of assessment to date of final payment; and,

WHEREAS, CHILDERS desires to ratify and accept said assignment on his behalf by BLACK DIAMOND to INTERNAL REVENUE of the proceeds of the Sublease attached hereto as Exhibit "C" in satisfaction of the taxes and interest specified in Exhibit "D"; and,

WHEREAS, INTERNAL REVENUE is desirous of obtaining said assignment by BLACK DIAMOND on behalf of CHILDERS of the royalties tendered in settlement of the scheduled taxes;

NOW, THEREFORE, in consideration of the mutual promises and covenants contained herein, and intending to be legally bound, the parties agree as follows:

1. BLACK DIAMOND and CHILDERS hereby assign all of their right, title and interest in and to overriding royalties in the amount of Four Percent (4%) of the gross sales price of all coal mined and sold from the LEASED PREMISES and in the amount of the minimum annual royalty of Two Hundred and Fifty Thousand Dollars ($250,000.00) payable with respect to that Sublease between Black Diamond Coal Company and GSR, Inc., attached hereto as Exhibit "C", to the extent of the taxes, interest and penalty scheduled in Exhibit "D", however it is agreed

between the parties hereto that this assignment shall be an assignment of the net royalty after estimated tax payments with respect to the royalty income are made by the escrow agent on behalf of Kennie R. and Debra S. Childers.

2. INTERNAL REVENUE hereby accepts said assignments of tonnage and minimum annual royalties to the extent of the liabilities stated in-Exhibit "D" hereto.

3. The parties hereby agree that the escrow agent appointed pursuant to an Escrow Agreement of even date herewith may deduct from the royalties assigned hereunder and applied to the Federal Income Tax due with respect thereto estimated tax payments due from Kennie R. Childers and Debra S. Childers. Said Escrow Agent shall make the subject estimated deposits directly to an account established for this purpose, file the 1040 ES forms required and pay the Escrowed deposits directly to the Internal Revenue Service.

4. The parties hereby agree that this agreement may be modified or amended to achieve a favorable private letter ruling from Internal Revenue that the royalties assigned hereunder shall be taxed only once at capital gains rates to Kennie R. Childers and Debra S. Chiders, and that the royalties shall retain their character as Section 631(c) Capital Gain Coal Royalties as distributed to and reported as such by Kennie R. Childers and Debra S. Childers.

IN WITNESS WHEREOF, the parties hereto have caused this Assignment of Interest to be executed as of the day and year first above written.

BLACK DIAMOND COAL COMPANY

BY: /s/ Kennie R. Childers
Kennie R. Childers, President

THE UNITED STATES
DEPARTMENT OF TREASURY
INTERNAL REVENUE SERVICE

BY:/s/ Clyde H. Allison
Clyde Allison, Revenue Officer

/s/ Kennie R. Childers
KENNE R. CHILDERS, Individually

STATE OF VIRGINIA
COUNTY OF TAZEWELL

I, Kenneth D. Childers, a Notary Public for the County of Tazewell aforesaid, in the State of Virginia, do certify that Kennie R. Childers as President of Black Diamond Coal Company and Individually, and Clyde Allison as Revenue Officer for the Internal Revenue Service whose names are signed to the writing above bearing the date on the 14th day of June, 1978, have acknowledged the same before me in my country aforesaid. Given under my hand this 14th day of June, 1978.

/s/ Kenneth D. Childers
Notary Public

My Commission Expires: 4-24-81

PREPARED BY:

/s/ Thomas E. Bulleit, Jr.
THOMAS E. BULLEIT, JR.
Arnold, Bulleitt & Kinkead
1502 First National Building
Lexington, KY 40507

ESCROW AGREEMENT

THIS ESCROW AGREEMENT, made and entered into this _____ day of _____, 1978, by and between BLACK DIAMOND COAL COMPANY, a West Virginia corporation, (hereinafter referred to as "BLACK DIAMOND"), KENNIE R. CHILDERS of Bluefield, Virginia, (hereinafter referred to as "CHILDERS"), and, THE UNITED STATES DEPARTMENT OF THE TREASURY — INTERNAL REVENUE SERVICE (hereinafter referred to as "INTERNAL REVENUE");

W I T N E S S E T H:

WHEREAS, the parties have entered into an Assignment of Interest of even date herewith whereby CHILDERS and BLACK DIAMOND have assigned their interest in a certain leasehold in McDowell County, West Virginia, to The Internal Revenue Service; and,

WHEREAS, INTERNAL REVENUE has accepted said lease in satisfaction of certain tax assessments against Kennie R. Childers and Debra S. Childers; and,

WHEREAS, the parties are desirous of appointing an escrow agent to receive and disburse royalties paid with respect to the subject leasehold; and,

WHEREAS, the Board of Directors of Black Diamond Coal Company has adopted a resolution pro-

viding that Thomas E. Bulleit, Jr., in his capacity as attorney for the corporation, by appointed to receive as escrow agent the royalties generated by that Sublease between the corporation and GSR, Inc., a Pennsylvania corporation, and disburse royalties received pursuant to Sublease to the underlying lessor and to INTERNAL REVENUE as their interests have contractually been agreed upon;

NOW, THEREFORE, in consideration of the mutual promises and covenants contained herein, and intending to be legally bound, the parties agree as follows:

1. The parties hereby appoint as escrow agent Thomas E. Bulleit, Jr., to receive the royalties generated by that Sublease between Black Diamond Coal Company and Kennie R. Childers and GSR, Inc.

2. The parties hereby agree that it shall be the duty of the escrow agent to notify GSR, Inc. of the appointment hereby made and to thereafter receive and disburse same in the following manner:

(a) Of the Fourteen Percent (14%) royalties received pursuant to the underlying lease and the Sublease as an override royalty, Ten Percent (10%) of said Fourteen Percent is to be disbursed to the base lessor;

(b) Of the Fourteen Percent (14%) royalties received pursuant to the base lease and the override provided in the Sublease, the net royalty, that royalty generated by the Four Percent (4%)

override less estimated tax payments, is to be disbursed to Internal Revenue; and,

(c) The net minimum annual royalty, the Two Hundred and Fifty Thousand Dollars ($250,000.00) less estimated tax payments, which is payable pursuant to the Sublease as an override royalty shall be disbursed to INTERNAL REVENUE; and,

(d) The escrow agent shall deduct from the Four Percent (4%) override royalty and the Two Hundred and Fifty Thousand Dollars ($250,000.00) minimum annual royalty estimated tax payments to fund the federal income tax due with respect to the assigned royalties, and shall make the subject estimated deposits directly to an account established for this purpose, file the 1040 ES forms required and disburse the escrow deposits directly to INTERNAL REVENUE.

3. Said royalties shall be disbursed within thirty (30) days of their receipt by the escrow agent.

4. Said royalties shall, to the extent possible, be deposited in interest-bearing accounts.

IN WITNESS WHEREOF, the parties hereto have caused this Escrow Agreement to be executed as of the day and year first above written.

BLACK DIAMOND COAL COMPANY

BY: Kennie R. Childers, President

KENNIE R. CHILDERS, Individually

THE UNITED STATES
DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE

BY: Clyde Allison, Revenue Officer

STATE OF VIRGINIA
COUNTY OF_____

I, _____, a Notary Public for the County of _____ aforesaid, in the State of Virginia, do certify that Kennie R. Childers as President of Black Diamond Coal Company and Individually, and Clyde Allison as Revenue Officer for the Internal Revenue Service whose name are signed to the writing above bearing the date on the _____ day of _____, 1978, have acknowledged the same before me in my county aforesaid. Given under my hand this _____ day of _____, 1978.

_____
Notary Public

My Commission Expires: _____

* * * * * * * * *

I hereby acknowledge and accept the above appointment as escrow agent.

_____
Thomas E. Bulleit, Jr.

RESOLUTION OF THE BOARD OF DIRECTORS OF BLACK DIAMOND COAL COMPANY

1. A majority of the Board of Directors of Black Diamond Coal Company constituting a quorum of the directors as defined by the bylaws of this corporation, called a special meeting of the Board of Directors pursuant to the bylaws, their attendance at such meeting constituting a Waiver of Notice of the meeting, for the purpose of adopting the following resolution:

> THAT Thomas E. Bulleit, Jr., in his capacity as attorney for this corporation, and in his capacity as escrow agent, appoint to receive the royalties generated by that Sublease between this corporation and GSR, Inc., a Pennsylvania corporation, said royalties having been assigned to the Internal Revenue Service, and to be disbursed by said escrow agent, be and hereby is authorized to establish on behalf of Black Diamond Coal Company and Kenny R. Childers and Debra S. Childers three (3) accounts at a Lexington, Kentucky, bank of his choice, the first of which shall be entitled "Black Diamond/W. B. Swope Account One," the second of which shall be entitled "Black Diamond/Internal Revenue Account Two," and a third of which shall be entitled "Kennie R. Childers and Debra S. Childers Estimated Tax Deposit Account." The purpose of these accounts is to receive for

> deposit and disbursement coal tonnage royalties and a minimum annual royalties pursuant to that Sublease between Black Diamond Coal Company and GSR, Inc., a copy of which is attached hereto as Exhibit "A" and made a part hereof by reference. Said funds to be disbursed in accordance with the terms of an assignment of interest and an escrow agreement between Black Diamond Coal Company, Kennie R. Childers and the United States Department of the Treasury Internal Revenue Service which are also attached hereto and made a part hereof by reference.

2. Kennie Childers, as chairman of the special meeting of the Board of Directors then offered the resolution for adoption by the Board of Directors. On motion duly made and seconded by /s/ Kennie R. Childers as secretary of the meeting, the following resolution as unanimously adopted:

> THAT Thomas E. Bulleit, Jr., in his capacity as attorney for this corporation, and in his capacity as escrow agent, appointed to receive the royalties generated by that Sublease between this corporation and GSR, Inc., a Pennsylvania corporation, said royalties having been assigned to the Internal Revenue Service, and to be disbursed by said escrow agent, be and hereby is authorized to establish on behalf of Black Diamond Coal Company and Kennie R. Childers and Debra S. Childers three (3) accounts at a Lexington, Kentucky bank of his choice, the

first of which shall be entitled "Black Diamond/W. B. Swope Account One," the second of which shall be entitled "Black Diamond/Internal Revenue Account Two," and a third of which shall be entitled "Kennie R. Childers and Debra S. Childers Estimated Tax Deposit Account." The purpose of these accounts is to receive for deposit and disbursement coal tonnage royalties and a minimum annual royalties pursuant to that Sublease between Black Diamond Coal Company and GSR, Inc., a copy of which is attached hereto as Exhibit "A" and made a part hereof by reference. Said funds to be disbursed in accordance with the terms of an assignment of interest and an escrow agreement between Black Diamond Coal Company, Kennie R. Childers and the United States Department of the Treasury/Internal Revenue Service which are also attached hereto and made a part hereof by reference.

3. There being no further business, on motion duly made and carried, the meeting was adjourned.

_____

Secretary

APPROVED:

/s/ Kennie R. Childers
Kennie R. Childers, Chairman

I hereby certify that the foregoing is a full, true and correct copy of the resolution duly and regularly

adopted by the Board of Directors of Black Diamond Coal Company on the 14th day of June, 1978, there being a quorum present and voting; and I further certify that there is nothing in the Bylaws of the corporation which in any way conflicts with the foregoing resolution.

WITNESS my hand and seal of the corporation on the 19th day of July, 1978.

ARTICLE III.—JUDICIAL POWER

Section 1. Supreme Court and inferior courts—Judges and compensation.

The judicial Power of the United States, shall be vested in one supreme Court, and in such Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section 2, Clause 1. Subjects of jurisdiction.

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority,—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdic-

tion;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between citizens of different States,—between citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

Sec. 2, C. 2. Jurisdiction of Supreme Court.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

CONSTITUTION
of the
UNITED STATES OF AMERICA

AMENDMENT 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

§ 7421. Prohibition of suits to restrain assessment or collection.

(a) Tax. Except as provided in sections 6212(a) and (c), 6213(a), 6672(b), 6694(c), 7426(a) and (b)(1), and 7429(b), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.

(b) Liability of transferee or fiduciary. No suit shall be maintained in any court for the purpose of restraining the assessment or collection (pursuant to the provisions of chapter 71) of—

(1) the amount of the liability, at law or in equity, of a transferee of property of a taxpayer in respect of any internal revenue tax, or

(2) the amount of the liability of a fiduciary under section 3467 of the Revised Statutes (31 U.S.C. 192) [3 USCS § 192] in respect of any such tax.

§2201. Creation of remedy.

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1954 [26 USCS § 7428], any court of the United States, upon filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

§ 2410. Actions affecting property on which United States has lien

(a) Under the conditions prescribed in this section and section 1444 of this title [28 USCS § 1444] for the protection of the United States, the United States may be named a party in any civil action or suit in any district court, or in any State court having jurisdiction of the subject matter—

(1) to quiet title to,

(2) to foreclose a mortgage or other lien upon,

(3) to partition,

(4) to condemn, or

(5) of interpleader or in the nature of interpleader with respect to,

real or personal property on which the United States has or claims a mortgage or other lien.

(b) The complaint or pleading shall set forth with particularity the nature of the interest or lien of the United States. In actions or suits involving liens arising under the internal revenue laws, the complaint or pleading shall include the name and address of the taxpayer whose liability created the lien and, if a notice of the tax lien was filed, the identity of the internal revenue office which filed the notice, and the date and place such notice of lien was filed. In actions in the State courts service upon the United States shall be made by serving the process of the court with a copy of the complaint upon the United States attorney for the district in which the action is brought or upon an assistant United States attorney or clerical employee designated by the United States attorney in writing filed with the clerk of the court in which the action is brought and by sending copies of the process and complaint, by registered mail, or by certified mail, to the Attorney General of the United States at Washington, District of Columbia. In such actions the United States may appear and answer, plead or demur within sixty days after such service or such further time as the court may allow.

(c) A judgment or decree in such action or suit shall have the same effect respecting the discharge of the property from the mortgage or other lien held by the United States as may be provided with respect to such matters by the local law of the place where the court is situated. However, an action to foreclose a mortgage or other lien, naming the United States as a party under this section, must seek judicial sale. A sale to satisfy a lien inferior to one of the United States shall be made subject to and without disturbing the lien of the United States, unless the United States consents that the property may be sold free of its lien and the proceeds divided as the parties may be entitled. Where a sale of real estate is made to satisfy a lien prior to that of the United States, the United States shall have one year from the date of sale within which to redeem, except that with respect to a lien arising under the internal revenue laws the period shall be 120 days or the period allowable for redemption under State law, whichever is longer, and in any case in which, under the provisions of section 505 of the Housing Act of 1950, as amended (12 U.S.C. 1701k) [12 USCS § 1701k], and subsection (d) of section 1820 of title 38 of the United States Code [38 USCS § 1820), the right to redeem does not arise, there shall be no right of redemption. In any case where the debt owing the United States is due, the United States may ask, by way of affirmative relief, for the foreclosure of its own lien and where property

is sold to satisfy a first lien held by the United States, the United States may bid at the sale such sum, not exceeding the amount of its claim with expenses of sale, as may be directed by the head (or his delegate) of the department or agency of the United States which has charge of the administration of the laws in respect to which the claim of the United States arises..

(d) In any case in which the United States redeems real property under this section or section 7425 of the Internal Revenue Code of 1954 [26 USCS § 7425], the amount to be paid for such property shall be the sum of—

> (1) the actual amount paid by the purchaser at such sale (which, in the case of a purchaser who is the holder of the lien being foreclosed, shall include the amount of the obligation secured by such lien to the extent satisfied by reason of such sale),
> (2) interest on the amount paid (as determined under paragraph (1) at 6 percent per annum from the date of such sale, and
> (3) the amount (if any) equal to the excess of (A) the expenses necessarily incurred in connection with such property, over (B) the income from such property plus (to the extent such property is used by the purchaser) a reasonable rental value of such property.

(e) Whenever any person has a lien upon any real or personal property, duly recorded in the jurisdiction in which the property is located, and a junior lien, other than a tax lien, in favor of the United States attaches

to such property, such person may make a written request to the officer charged with the administration of the laws in respect of which the lien of the United States arises, to have the same extinguished. If after appropriate investigation, it appears to such officer that the proceeds from the sale of the property would be insufficient to wholly or partly satisfy the lien of the United States, or that the claim of the United States has been satisfied or by lapse of time or otherwise has become unenforceable, such officer shall so report to the Comptroller General who may issue a certificate releasing the property from such lien.

Opposition

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No. 81-250

In the Supreme Court of the United States

OCTOBER TERM, 1980

KENNIE R. CHILDERS AND BLACK DIAMOND COAL COMPANY, INC., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that neither the Anti-Injunction Act, 26 U.S.C. 7421(a), nor the tax exception to the Declaratory Judgment Act, 28 U.S.C. 2201, precludes the present action, which seeks (1) a judgment declaring the obligations of the parties arising out of an agreement between petitioners and the Internal Revenue Service providing for the payment of petitioner Childers' conceded tax liability, (2) to quiet title to Childers' residence, on which the IRS has levied, and (3) to enjoin any tax sale of the residence.

1. Petitioner Childers has conceded (Pet. 2) unpaid liabilities for personal income taxes, penalties and interest for the years 1975 and 1976 in the amount of $959,367.59. In an effort to satisfy this debt and to forestall further collection efforts, Childers and petitioner Black Diamond Coal Company, Inc., of which Childers is the president and sole

shareholder, agreed in 1978 to assign mineral royalties from certain coal lands in West Virginia to the IRS to pay Childers' taxes on an installment basis. The "Assignment of Interest" executed by petitioners and the IRS (Pet. App. 23a-27a) assigned the right to an annual minimum royalty of $250,000. In addition, Childers, his wife and the IRS executed an "Installment Agreement" (Pet. App. 21a-23a), which provided for Childers' payment of his liabilities by reference to the Assignment of Interest. The Installment Agreement also provided (Pet. App. 22a) that "[i]f the conditions of this agreement are not met * * * the entire tax liability may be collected by levy on income or by seizure of property" (Pet. App. 4a-5a).

After the IRS failed to receive the $250,000 minimum payment due on December 31, 1978, it declared the Installment Agreement in default, and, on August 31, 1979, executed a levy on Childers' real and personal property. On September 19, 1979, petitioner Childers filed a complaint in the United States District Court for the Western District of Virginia seeking declaratory and injunctive relief from the IRS' collection efforts. The district court issued a temporary restraining order and, subsequently, a preliminary injunction prohibiting the IRS from seizing and selling Childers' property. On June 19, 1980, both petitioners filed a complaint seeking a judgment "declaring the rights of the parties" under the agreements between the IRS and Childers (Pet. App. 5a).

On July 8, 1980, the district court dissolved the preliminary injunction and granted the government's motion for summary judgment in the first case (Pet. App. 11a-18a). It found that, according to the agreement between Childers and the IRS, the IRS was to receive at least $250,000 per year from the assigned coal leases, but, in the event it did not receive such payment, the IRS was not required to pursue collection efforts against third parties before it could act

against Childers. On September 29, 1980, the district court granted the government's motion to dismiss the second case without opinion (Pet. App. 20a-21a). The United States Court of Appeals for the Fourth Circuit affirmed the judgments of the district court on the ground that the district court lacked jurisdiction to grant the relief sought by petitioners against the United States (Pet. App. 3a-4a).

2. As the Fourth Circuit remarked (Pet. App. 6a), "[i]t is manifest that [by these actions] Childers seeks to restrain the IRS from pursuing its statutory remedies to collect the taxes that Childers concedes are due." Accordingly, the court of appeals correctly concluded that the relief sought by petitioners is precisely the type that the Anti-Injunction Act, 26 U.S.C. 7421(a), and the tax exception to the Declaratory Judgment Act, 28 U.S.C. 2201, were designed to preclude. Section 7421(a) of the Internal Revenue Code specifically provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person * * *." The Declaratory Judgment Act expressly excludes declaratory relief "with respect to Federal taxes * * *" (28 U.S.C. 2201). The court also was correct in holding (Pet. App. 9a) that the single exception to the Anti-Injunction Act, recognized by this Court in *Enochs* v. *Williams Packing & Navigation Co.*, 370 U.S. 1, 6-7 (1962), is not applicable because, notwithstanding the fact "that the district court afforded him the full discovery to which he was entitled within the parameters of relevance, and there was no abuse of discretion in denying him more," Childers "concede[d] that he has been unable to prove that the government cannot prevail in the actions that he has brought."[1]

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[1]In addition, as the court of appeals suggested, without deciding the issue (Pet. App. 8a n.2), petitioners also failed to satisfy the second prong of the *Enochs* exception to the Anti-Injunction Act: to show that the case meets the traditional requirements for the invocation of equity

3. The decisions on which petitioners rely (Pet. 8-10) either are inapposite to the present case or do not conflict with the decision below.[2] *Commissioner* v. *Shapiro*, 424 U.S. 614 (1976), involved a failure adequately to apprise the taxpayer of the basis for a jeopardy assessment (where collection is made before correctness of the assessment is established). By contrast, petitioner Childers has conceded his liability (Pet. 2). *Aqua Bar & Lounge, Inc.* v. *United States Department of Treasury*, 539 F. 2d 935 (3d Cir. 1976), involved an allegation that the IRS had failed to comply with the statutorily prescribed procedures for enforcing tax liens. As the court of appeals noted (Pet. App. 9a), however, Childers "does not question IRS' compliance with the Code's procedures * * *."

Finally, *United States* v. *Coson*, 286 F. 2d 453 (9th Cir. 1961), entailed "no need for any injunctive relief." *Id.* at 459. Moreover, *Coson* was decided prior to this Court's decision in *Enochs, supra*. If *Coson* presents any conflict, it is not with the decision below, but rather with *Enochs*, and, to that extent, *Coson* should be regarded as having been overruled *sub silentio* by *Enochs*. Compare *United States* v. *Coson, supra*, 286 F. 2d at 459 n.9 (noting the " 'special and

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jurisdiction, including the existence of irreparable injury. As the court below noted (*ibid.*), Section 6337 of the Internal Revenue Code (26 U.S.C.) affords Childers the opportunity, either before or after the sale of his real estate, to redeem his interest in that property. Moreover, 28 U.S.C. 1491 confers jurisdiction on the Court of Claims to entertain any cause of action for breach of contract that petitioners may have against the United States.

[2]Notwithstanding their allegation of a conflict requiring the intervention of this Court, petitioners assert (Pet. 5, 6) that "there are no judicial decisions interpreting [the IRS' installment agreements]" and that "this case is primarily one of first impression * * *."

extraordinary circumstances' " equitable test of *Miller* v. *Standard Nut Margarine Co.*, 284 U.S. 498, 509 (1932)), and *Bob Jones University* v. *Simon*, 416 U.S. 725, 744, 746 (1974) (describing *Standard Nut* as "a significant deviation from precedent" and remarking that an "evisceration of the [Anti-Injunction] Act [was] inherent in *Standard Nut*").

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

SEPTEMBER 1981

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